

In the Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL E. HUYGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES
IN OPPOSITION

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QUESTION PRESENTED

Whether the Merit Systems Protection Board has jurisdiction over a Postal Service employee's appeal of a claim that his wages were unlawfully reduced when he elected to become a rural letter carrier.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE
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**BRIEF FOR THE UNITED STATES
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1) is unreported, but the decision is noted at 937 F.2d 623 (Table). The order of the Merit Systems Protection Board (MSPB or Board) (Pet. App. A2-A4) is unreported, but is noted at 46 M.S.P.R. 106 (Table). The initial decision of the MSPB (Pet. App. A5-A16) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on June 11, 1991. The petition for a writ of certiorari was filed on September 9, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

(1)

STATEMENT

1. The National Rural Letter Carriers' Association (NRLCA) is the exclusive collective bargaining representative for all rural letter carriers. In 1984, the NRLCA and the Postal Service were unable to agree on the terms of a collective bargaining agreement. In accordance with 39 U.S.C. 1207(c), the dispute was referred to binding arbitration and, in 1985, a panel headed by Arbitrator Volz issued an award determining the terms of an agreement covering the period from 1984 through 1988. Article 9.1.B.1 of this agreement established an entry wage level, known as "Step B," for "all new regular [rural] carrier appointees."¹ Gov't Br. in Opp. at 2, *Kaiser v. United States Postal Service*, cert. denied, 111 S. Ct. 673 (1991).

In 1988, the NRLCA and the Postal Service negotiated a successor agreement (the Agreement) in which Article 9.1.B.1 was carried forward without change. *Kaiser Br. in Opp.* at 2-3. The NRLCA and the Postal Service have consistently interpreted this contract provision to provide that, with exceptions contained in the Agreement itself, postal employees appointed to positions as rural carriers are to be paid

¹ Article 9.1.B.1 provided:

There shall be a new Rural Carrier Evaluated Schedule, which expands each evaluated level to 14 steps by adding two (2) new lower steps. These two (2) lower steps shall be designated Steps B and C (There shall be no Step A.) Effective January 19, 1985, all new regular carrier appointees will begin at Step B, except for substitute rural carriers who convert to regular status. Substitute rural carriers will be converted to regular carrier status at Step 8 or their existing step, whichever is lower, provided, however, that substitutes serving in excess of 90 days on a vacant route at the time of conversion will convert at their existing steps.

initially at the Step B wage level. See *McGarigle v. United States Postal Service*, 904 F.2d 687, 691 (Fed. Cir. 1990); Pet. App. A11.

2. In 1987, petitioner, a Postal Service custodian, sought and was offered a position as a regular rural letter carrier. In accordance with the Agreement, petitioner was paid at the Step B wage rate in his position as a rural carrier. Alleging that he had accepted the new position in reliance on the representation of Postal Service officials that he would retain the higher step and salary he had attained as a custodian, petitioner, along with 10 other similarly situated Postal Service employees, initiated grievance proceedings under the Agreement. Pet. App. A7-A8. These grievances were heard and denied by Arbitrator Zumas, who found that, under the Agreement, the employees were required to be paid at the Step B rate in their positions as rural letter carriers. *Id.* at A8; see also Pet. 11-12.

3. Some two years after petitioner began working as a rural carrier, he appealed his Step B wage to the MSPB. Pet. App. A9, A8 n.4. Without addressing the timeliness of the appeal, the MSPB administrative law judge, in an initial decision, dismissed the appeal because the petitioner had not met his burden of proving that the appeal fell within the MSPB's jurisdiction. *Id.* at A9-A10. Relying upon *Lemon v. Department of Labor*, 44 M.S.P.R. 43 (1990), the ALJ found that, under 5 C.F.R. 752.401(b)(15), petitioner's challenge to the change in his rate of pay was not within the Board's jurisdiction. As the ALJ observed, that regulation provides that a reduction in pay from a rate that is "contrary to law or regulation" is not an "adverse action" appealable to the MSPB. Pet. App. A12. The ALJ noted that it was "essentially undisputed" that Article 9.1.B.1 of the

negotiated Agreement required that rural letter carriers in petitioner's position be paid at the Step B rate. *Id.* at A11. The ALJ also observed that the MSPB treats such negotiated agreements "in the same manner as agency regulations." *Id.* at A12 n.9. The ALJ concluded that, "[b]ecause the rate promised to the [petitioner] was contrary to the negotiated agreement, adjustment of that pay to the rate mandated by the agreement cannot be considered an adverse action" appealable to the MSPB. *Id.* at A12.²

4. On September 27, 1990, the MSPB denied a petition for review of the initial decision, Pet. App. A2-A4, and, on June 11, 1991, the court of appeals affirmed the MSPB order. *Id.* at A1.

² The ALJ also noted that, although the Zumas Arbitration Award was not entitled to collateral estoppel effect, it was entitled to Board deference and would be set aside only where petitioner showed that the arbitrator erred in interpreting civil service law, rules, or regulations. The arbitrator made no such error. Pet. App. A11 n.8.

The ALJ also rejected petitioner's argument that Section 424.221 of the Postal Service's Employee and Labor Relations Manual mandated that he receive a higher rate of pay than the Step B wage. The judge observed that petitioner had failed to provide a copy of the cited provision, and also noted that another provision of the Manual appeared to give the Postal Service discretion in setting the pay level for rural carriers. Pet. App. A11-A12 n.8.

ARGUMENT

The court of appeals correctly upheld the MSPB's determination that it lacked jurisdiction to hear petitioner's appeal challenging his rate of pay as a rural letter carrier. The court's determination does not conflict with any decision of this Court or the courts of appeals. On the contrary, the decision follows directly from a previous decision of the Federal Circuit addressing the same issue, see *McGarigle v. United States Postal Service*, 904 F.2d 687, 691 (1990), and is consistent with other decisions that have rejected challenges to the application of Article 9.1.B.1.³ Further review is not warranted.

1. a. As in this case, the MSPB in *McGarigle* determined that it lacked jurisdiction over an appeal by a postal employee who had accepted a position as a rural letter carrier concerning a reduction in his rate of pay to the Step B rate. In upholding that ruling, the Federal Circuit noted that Article 9.1.B.1 of the Agreement—the same provision at issue in the instant case (see note 1, *supra*)—clearly applied to postal employees who had transferred from other jobs to the position of rural letter carrier, and not just to new hires. Noting that Article 9.1.B.1 of the Agreement prescribes the Step B rate as the base pay for

³ Based on the determination that 39 U.S.C. 1006 of the Postal Reorganization Act does not give rise to an implied right of action, two courts of appeals have dismissed challenges to the application of the Step B wage rate to postal employees that become rural carriers. See *Glenn v. United States Postal Service*, 939 F.2d 1516 (11th Cir. 1991); *Kaiser v. United States Postal Service*, 908 F.2d 47 (6th Cir. 1990), cert. denied, 111 S. Ct. 673 (1991). See also *McGarigle v. United States Postal Service*, 904 F.2d at 691-692 & n.7.

“new regular carrier appointees,” the court acknowledged that that phrase is “subject to more than one reasonable interpretation.” 904 F.2d at 691. The court observed, however, that “[b]oth parties to the Agreement testified” as to the meaning of the contract language, and that both agreed that the provision covered postal employees transferring from non-rural carrier positions. *Ibid.* The *McGarigle* court also rejected the contention that a higher rate of pay was fixed by Section 424.221 of the Employee and Labor Relations Manual, which states that a postal employee is not required to accept a pay cut upon reassignment to a rural carrier position. The court noted that, under Article 19, § 1 of the Agreement between the NRLCA and the Postal Service, “the Agreement must control” in the event of any conflict between the Agreement and pre-existing Postal Service manuals or published regulations. 904 F.2d at 691 & n.6. Therefore, the rate of pay for the postal employee in that case was controlled by Section 9.1.B.1 of the Agreement, which required that he be paid at the Step B rate.

The Federal Circuit in *McGarigle* concluded, as it did here, that the MSPB lacked jurisdiction over a challenge to a rural letter carrier’s reduction in pay to the level mandated in the Agreement. Because the rate from which the salary had been reduced was contrary to the Agreement, it was unlawful. Under 5 C.F.R. 752.401(b)(15), a reduction in pay from an unlawful rate is not an “adverse action” appealable to the MSPB. 904 F.2d at 691.

b. The analysis in *McGarigle* applies with full force here. Not every unfavorable administrative action—and not every reduction in pay—constitutes an adverse action appealable to the Board. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9 (Fed. Cir.

1985). Although changes in an employee's grade or pay level are generally classified as adverse personnel actions appealable to the Board, see 5 U.S.C. 1205, 7701, 7511(a)(1), 7512, 7513(d),⁴ regulations prom-

⁴ Section 1205 of Title 5, U.S.C., provides in pertinent part:

(a) The Merit Systems Protection Board shall—

(1) hear, adjudicate or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board under this title, section 2023 of title 38, or any other law, rule, or regulation, and, subject to otherwise applicable provisions of law, take final action on any such matter;

* * * * *

Section 7511(a)(1), 5 U.S.C., in pertinent part, defines an "employee" as:

(B) * * * a preference eligible in the United States Postal Service * * * who has completed 1 year of current continuous service in the same or similar positions;

Section 7512, 5 U.S.C., provides, in pertinent part, that the adverse personnel actions covered by the subchapter in which it is found include:

* * * * *

- (3) a reduction in grade;
- (4) a reduction in pay; and

* * * * *

Section 7513(d), 5 U.S.C., provides:

An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

Section 7701, 5 U.S.C., provides, in pertinent part:

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—

- (1) to a hearing for which a transcript will be kept; and

[Continued]

ulgated under the Civil Service Reform Act specifically exclude from this category challenges to a pay reduction from a rate that is contrary to law or regulation. See 5 C.F.R. 752.401(b). The MSPB in this case determined that it was unlawful for the Postal Service to pay petitioner at a higher rate than the Step B level because the negotiated Agreement mandated that he be paid at the Step B rate. Because petitioner challenged a reduction from a rate of pay that was contrary to a negotiated Agreement, the MSPB had no jurisdiction over the appeal.

e. Petitioner argues that, notwithstanding the parties' interpretation of the Agreement, Section 9.1.B.1 does not cover postal service employees such as petitioner who transfer to rural letter carrier positions, but only newly hired employees.⁵ Petitioner's attack (Pet. 17-20) on the Board's interpretation of the scope of Section 9.1.B.1 is unavailing. The intent of the parties fixes the meaning of the terms of a labor

⁴ [Continued]

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

* * * * *

⁵ Petitioner relies for this construction on the preliminary decision of the MSPB administrative law judge in *Stenvis v. United States Postal Service*, see Pet. App. A17-A36, which held that the rate of pay prescribed in Section 9.1.B.1 of the Agreement does not apply to postal employees reassigned to rural carrier positions. Petitioner's reliance is misplaced. An unreviewed initial decision of the MSPB has no precedential value. Even if it did, that decision was superseded by the Federal Circuit's subsequent decision in *McGarigle*, which repudiated the construction of Section 9.1.B.1 adopted in *Stenvis*.

agreement as long as that interpretation is not contrary to law. *Gamble v. United States Postal Service*, 48 M.S.P.R. 228, 232 (1991). Here, both parties to the contract agreed that Section 9.1.B.1 prescribes the rate of pay for employees in petitioner's position. Pet. App. A11; *McGarigle*, 904 F.2d at 691. Petitioner has pointed to nothing in the Postal Reorganization Act that would preclude construing the Agreement to cover him.⁶

2. a. Petitioner complains at length (Pet. 22-28) about the failure of the MSPB to hold a hearing on jurisdiction, claiming that he was denied an opportunity to show "factual differences," or to "develop a record" pertinent to resolution of that issue. As the ALJ in this case noted, petitioner's request for a hearing was initially rejected because he failed to allege facts which, if proven, would establish Board jurisdiction. Pet. App. A7 n.2. Petitioner does not cure that defect here. The Board's determination that it lacked jurisdiction rests on a question of contract interpretation: whether the negotiated Agreement mandates that petitioner be paid at the Step B rate

⁶ Petitioner contends that interpreting the Agreement to permit the Postal Service to reduce petitioner's pay to the Step B level is "contrary to the mandate of 39 U.S.C. 1006." Pet. 15 n.8. It is not. That provision makes Postal Service employees "eligible for promotion or transfer to any other position in the Postal Service or the executive branch of the Government of the United States for which they are qualified" and directs responsible officials to exercise their authority to grant promotions or transfers so as "to provide a maximum degree of career promotion opportunities for officers and employees and to insure continued improvement of postal services." Section 1006 thus consists of general directives designed to facilitate the career mobility of federal workers. It does not entitle any employee to a transfer on any particular terms or at any specific rate of pay.

rather than at the rate from which his pay was reduced. Petitioner does not show how that purely legal issue turns on factual questions that might be resolved at a hearing.

b. Petitioner also claims (Pet. 29-32) that a hearing should have been held to consider whether he is entitled to estop the government from reducing his rate of pay. As petitioner notes, it is "undisputed on the record" that, at the time petitioner was considering transferring to the rural letter carrier position, Postal Service officials told him that his pay would remain at its previous levels. Pet. 29. He points to no facts in dispute that are pertinent to the estoppel issue. In any event, petitioner is not entitled to estoppel against the government. In entering into the Agreement setting petitioner's pay at the Step B rate, the Postal Service exercised its statutory power to "fix the compensation and benefits of all officers and employees in the Postal Service." 39 U.S.C. 1003. There can be no estoppel against the government to effect the disbursement of funds in excess of the amount that the Postal Service is authorized to pay in the exercise of its statutory authority. See *Office of Personnel Management v. Richmond*, 110 S. Ct. 2465 (1990).

CONCLUSION

The petition for writ of certiorari should be denied.
Respectfully submitted,

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